No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, TEXAS, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Congress has directed the installation of physical barriers and roads to prevent illegal crossing of the Nation's border and has provided that, "[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 102(c)(1), 110 Stat. 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306. The questions presented are:

1. Whether this waiver provision constitutes an unconstitutional delegation of legislative power to the Executive because only limited judicial review of the Secretary's discretionary action is permitted.

2. Whether the statutory authority to "waive all legal requirements" is a sufficiently clear statement permitting the waiver of state and local (as well as federal) legal requirements.

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OPINIONS BELOW

The opinion of the district court granting respondents' motion to dismiss (Pet. App. 49a-55a) is unreported. The opinion of the district court denying petitioners' motion for preliminary injunction (Pet. App. 18a-48a) is unreported.

JURISDICTION

The judgment of the district court was entered on September 11, 2008. The petition for a writ of certiorari was filed on December 10, 2008. The jurisdiction of this Court is invoked under Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 306. For the

reasons set forth below (see pp. 8-13, *infra*), it appears that petitioners now lack Article III standing to raise their claims.

STATUTORY PROVISION INVOLVED

Section 102(a)-(c) of IIRIRA, as amended in 2005 and 2006, is reprinted at App., *infra*, 1a-4a.

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought, among other things, to improve security at the Nation's borders in order to halt illegal immigration. Section 101 of IIRIRA increased the number of border patrol agents and their supporting personnel. See 110 Stat. 3009-553. Section 102 of IIRIRA specifically addressed physical barriers at the Nation's borders. Section 102(a) required the Attorney General to improve barriers at the border, and specifically required her to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." 110 Stat. 3009-554. Section 102(c) provided that the provisions of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, "are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555.

When it created the Department of Homeland Security (DHS), Congress transferred the Attorney General's powers and duties to "control and guard the boun-

daries and borders of the United States against the illegal entry of aliens" to the Secretary of Homeland Security (Secretary). 8 U.S.C. 1103(a)(1) and (5); see also 6 U.S.C. 251 and 291.

In 2005, Congress amended several federal laws with the declared purpose of "protect[ing] against terrorist entry." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302. One of those amendments expanded the scope of Section 102(c) of IIRIRA, which had authorized the waiver of the ESA and NEPA if necessary to ensure expeditious construction of barriers and roads at the border. That waiver provision now reads as follows:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1), as amended, 119 Stat. 306.

Congress also provided for limited and streamlined judicial review of such waivers. A federal district court may hear a claim arising from the Secretary's exercise of the waiver authority, but only if the claim "alleg[es] a violation of the Constitution of the United States"; the claim must be brought within 60 days after the waiver; and any district court decision is reviewable only through a writ of certiorari from this Court. IIRIRA § 102(c)(2)(A)-(C), as amended, 119 Stat. 306.

In the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, Congress imposed additional obligations

on the Secretary with regard to border security. Among other things, it gave the Secretary 18 months to take "all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States," through both border surveillance and "physical infrastructure enhancements." § 2(a), 120 Stat. 2638. Congress defined "operational control" as "the prevention of *all unlawful entries* into the United States." § 2(b), 120 Stat. 2638 (emphasis added). Section 3 of the Secure Fence Act amended Section 102(b) of IIRIRA by expanding the number of places where Congress expressly directed that the Secretary erect border fencing. 120 Stat. 2638-2639.

2. a. In orders that took effect on April 8, 2008, the Secretary executed two waivers under Section 102(c)(1), finding the waivers were necessary to ensure the expeditious construction of barriers and roads required by Congress. Pet. App. 4a, 15a. He waived the applicability of "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" specified federal statutes with respect to such construction along numerous designated portions of the United States border with Mexico that he had determined were areas "of high illegal entry into the United States." *Ibid.*

b. On June 2, 2008, petitioners filed this lawsuit, alleging that the statutory waiver authority in Section 102(c)(1) of IIRIRA effected an unconstitutional delegation of legislative authority to the Executive, a violation of the Constitution's lawmaking procedures, and a violation of the Tenth Amendment and constitutional principles of federalism. Compl. ¶¶ 33-47. Petitioners sought a declaration that the statutory waiver authority in gen-

eral and the two specific waivers noted above are unconstitutional. *Id.* at 17. Their complaint sought an injunction against construction of border barriers or related infrastructure in the relevant areas "unless and until the Government has complied with all applicable laws." *Ibid.*

Petitioners also requested a "preliminary injunction barring [DHS] from proceeding with construction of any fencing, walls, or other physical barriers or related infrastructure." Application for Preliminary Injunction 1, 3:08-cv-196-FM Docket entry No. 19 (W.D. Tex. June 23, 2008). In support of that request, petitioners submitted declarations explaining that the actual construction of border barriers and related infrastructure would cause them irreparable injury by, for example, cutting off an Indian Tribe's access to a stretch of the Rio Grande River used in religious ceremonies, "impair[ing] the ability of the [El Paso County Water Improvement] District [No. 1] to deliver water," and damaging "the natural environment of the Lower Rio Grande Valley." Paiz Decl. ¶¶ 3-4, 3:08-cv-196-FM Docket entry No. 19-3 (W.D. Tex. June 23, 2008); Reyes Decl. ¶ 7, 3:08-cv-196-FM Docket entry No. 19-4 (W.D. Tex. June 23, 2008); Bartholomew Decl. ¶ 9, 3:08-cv-196-FM Docket entry No. 19-2 (W.D. Tex. June 23, 2008); see also Pet. 8-9 (describing two of those declarations).

3. The district court denied petitioners' request for a preliminary injunction. Pet. App. 18a-48a. The court first held that the statutory grant of authority to the Secretary to waive otherwise applicable laws is constitutional "because [Congress] provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements." *Id.* at 28a. The court explained that the intelligible principle was supplied by Section

102 of IIRIRA, which provides that the Secretary can waive those laws only as "necessary to ensure expeditious construction" of "physical barriers and roads * * * to deter illegal crossings in areas of high illegal entry." § 102(a), 110 Stat. 3009-554; § 102(c)(1), as amended, 119 Stat. 306; see Pet. App. 26a-27a (citing *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244, at *8-*9 (S.D. Cal. Dec. 12, 2005), and *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008)).

The district court also rejected petitioners' contention that "a constitutional delegation of legislative authority requires an intelligible principle *and* judicial review." Pet. App. 28a. Among other things, it cited this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001), which it described as holding that "a constitutionally permissible delegation only require[s] Congress to provide an intelligible principle to guide the exercise of delegated authority." Pet. App. 30a. The district court observed that petitioners cited no decision of this Court striking down a statute under the nondelegation doctrine for lack of judicial review, and that this Court had denied a petition for certiorari in *Defenders of Wildlife* v. *Chertoff*, *supra*, which would have given it the opportunity to impose a requirement of judicial review. Pet. App. 32a. The district court also noted that limited judicial review of the Secretary's waiver decisions is in fact available. *Ibid.*

Finally, the district court rejected petitioners' suggestion that the language of Section 102(c)(1) lacks the "clear statement" that petitioners contended was necessary to indicate Congress's intent to preempt the operation of state or local (as opposed to federal) law. Pet.

App. 39a-43a. The court concluded that the statute constitutes an express preemption provision because of its unambiguous statement that the Secretary has authority "notwithstanding any other provision of law," to "waive all legal requirements." *Id.* at 39a (quoting IIRIRA § 102(c)(1)).[1]

Having concluded that petitioners had failed to establish a substantial likelihood of success on the merits, the district court went on to conclude that petitioners had not shown (1) a substantial threat that they would suffer irreparable injury in the absence of a preliminary injunction, Pet. App. 43a-46a, (2) that the threatened injury to them outweighed the threatened injury to the defendants, *id.* at 46a-48a, or (3) that granting the preliminary injunction would not adversely affect the public interest, *ibid.*

The district court later granted respondents' motion to dismiss, based on the analysis contained in its earlier opinion denying petitioners' application for a preliminary injunction. Pet. App. 49a-55a.

ARGUMENT

Petitioners repeat their contentions that the waivers authorized by Section 102(c)(1) of IIRIRA reflect an unconstitutional delegation of legislative authority because the statute provides for only limited judicial review (Pet. 11-21), and that the statutory authority to

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[1] The district court also rejected petitioners' contention—not raised in their petition for a writ of certiorari—that Section 102(c)(1) violates the bicameralism and presentment requirements of Article I of the Constitution (U.S. Const. Art. I, § 7, Cl. 2 and 3). Pet. App. 34a-36a. The court explained that the same argument had been rejected in *Defenders of Wildlife* and was inadequately developed by petitioners here. *Ibid.*

"waive all legal requirements" does not allow for the preemption of state and local (as opposed to federal) laws (Pet. 21-29). Because petitioners no longer seek to enjoin construction of border barriers, they appear to lack standing to pursue their claims. In any event, the decision of the district court is correct and does not conflict with any decision of this Court or any other court. This Court has already denied certiorari in a case that presented petitioners' first question. *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008). Review in this case is also unwarranted.

1. As an initial matter, this Court appears to lack Article III jurisdiction over this case, because petitioners, as plaintiffs, bear the burden of adequately alleging "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see *Daimler-Chrysler Corp.* v. *Cuno*, 547 U.S. 332, 340 (2006). That burden applies for "each type of relief" that petitioners seek. *Summers* v. *Earth Island Inst.*, No. 07-463 (Mar. 3, 2009), slip op. 4.

a. With respect to the Secretary's waiver of *federal* statutes, petitioners' only alleged injuries flow from the construction of border barriers and related infrastructure. See Compl. ¶¶ 28 (alleging that waivers harm water-district petitioners "by facilitating construction of border fencing"), 29 (alleging that waivers harm Indian Tribe petitioner because they "facilitate[] construction of fencing"), 30 (alleging that petitioners are harmed by the waivers because they "facilitate construction of border fencing"), 32 (alleging that waivers harm petitioner

Mark Clark because they "will facilitate construction of fencing"); see also p. 5, *supra* (citing petitioners' declarations alleging imminent and irreversible injury from threatened construction); Pet. 8-9 (describing same).

Although petitioners previously requested an injunction against the construction of border barriers—which *could* have redressed the injuries they have alleged in association with the waiver of federal statutes—their petition for a writ of certiorari changes course and concedes "the broad authority of the Secretary to waive federal legal requirements that are truly necessary to achieve [expeditious construction of the border fence]." Pet. 33. Accordingly, they no longer seek "a judgment enjoining further construction of the fence." *Ibid.*[2] Instead, petitioners now state that, with respect to the waiver of federal statutes, the constitutional infirmity is "the statute's preclusion of judicial review to ensure that the Secretary's waiver decisions comply with applicable legal requirements," and they claim that infirmity can be corrected by interpreting (or modifying) the statute "to provide for judicial review of the Secretary's actions." *Ibid.* The relevant jurisdictional questions are thus whether petitioners' alleged injuries are fairly traceable to the limitations on judicial review of the waiver determinations and also whether providing judi-

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[2] As of the filing date of this brief, DHS has substantially completed construction of approximately 309 miles of pedestrian fencing (out of a planned 358 miles), and has substantially completed construction of approximately 301 miles of vehicle fencing (out of a planned 303 miles). Included within those totals are the 22 miles in Hidalgo County that are the subject of one of the two waivers at issue in this case as well as substantial portions of the 470 miles covered by the second waiver. Construction continues on the remaining segments of planned fencing.

cial review for compliance with statutory requirements is likely to redress those injuries.

The statutory limitations on judicial review, by themselves, do not constitute a redressable injury. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, slip op. 8. To demonstrate standing, petitioners must show "that the procedural violation [here, the limitations placed on judicial review of waiver determinations] endangers a concrete interest of [petitioners]." *Lujan*, 504 U.S. at 573 n.8.

Accordingly, petitioners must allege that the existence of judicial review would create a reasonable possibility that the specific injuries they allege could be redressed. But they have not done so. As noted above, the specific injuries they allege stem from construction of border barriers. It necessarily follows that the statutory waivers cause them harm only to the extent that they facilitate the construction of those barriers. And, indeed, as noted above, the gravamen of the complaint is that the waivers harm petitioners precisely because they "will facilitate construction of border fencing." Compl. ¶ 30; see also *id.* ¶¶ 29 (alleging that "[b]ut for the waiver," construction of border fencing "would be barred" by one of the waived federal statutes), 31 (noting that waiver of a particular federal statute was necessary "to proceed with construction").

Because petitioners here disclaim any request for injunctive relief to bar construction, the injuries they have alleged cannot be remedied through a declaratory judgment making available the expanded judicial review that they now seek. Such review presumably would be invoked to determine whether the Secretary had com-

plied with the only statutory limitation on his waiver authority: the requirement that each waiver be "necessary to ensure the expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1), as amended, 119 Stat. 306. But petitioners do not (and cannot) allege that the Secretary's waivers were not necessary for that purpose; in fact, their complaint specifically alleges harm because the waivers *will* facilitate construction. It therefore is difficult to see how petitioners could obtain meaningful relief through the judicial-review proceedings that they claim are necessary, while at the same time they disavow any need or intention to stop construction. As a result, they appear to lack standing to contest the waiver of federal statutes, because their alleged injuries cannot fairly be traced to the absence of judicial review, and providing judicial review of the waivers would not redress any such injuries.[3]

b. With respect to the Secretary's waiver of state and local laws, petitioners have simply failed to allege the requisite injury. As this Court has noted, "[t]o qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent." *Davis* v. *FEC*, 128 S. Ct. 2759, 2768 (2008) (citing *Lujan*, 504 U.S. at 560-561). Petitioners allege that the waivers call into question or cast doubt on the continuing validity of various state, county, and city laws, thus leaving the governmental petitioners and their citizens without certainty about the state of the law. Compl. ¶¶ 25-27. But the governmental petitioners do not cite any particular state or local provision that has been invalidated or the validity of which the waivers have called into question.

[3] In this regard, it is telling that petitioners refer to the "*potential* impairment of private rights by the Secretary's orders," Pet. 19 (emphasis added), rather than any actual or concrete impairment.

Nor do they identify any actual instance in which they have been *injured* by any such consequence of a waiver.[4] Their alleged uncertainty is not "concrete, particularized, and actual or imminent." *Davis*, 128 S. Ct. at 2768. Instead, it is vague, general, potential, and contingent. Moreover, the well-established bar on federal courts' issuance of advisory opinions, see, *e.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), would be routinely circumvented if any state or local governmental entity could allege Article III injury on the basis of abstract uncertainty resulting from the existence of unanswered "questions" about the extent of its legal authority.

Petitioners' complaint does allege that waiver of "the Texas Antiquities Code, and other laws related to historic preservation," would injure the "aesthetic, cultural, artistic, professional, and economic interests" of petitioner Mark Clark, as the owner of an historic building near the United States border with Mexico that houses a fine arts gallery and studio and also as a member of the Brownsville Heritage Review Committee. Compl. ¶ 32. But that allegation is also conclusory. It alleges no concrete or particularized injury, instead specifying only broad categories of interests allegedly injured.

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[4] Petitioners similarly complain (Pet. 5, 19, 29) that the Secretary's waivers are "unclear," "vague," "uncertain[]" and "ambigu[ous]" with respect to which state and local laws have been waived, as to whom they are waived, in what physical locations they are waived, and the duration of the waivers. But they do not identify any specific harm they have allegedly suffered as a result of that asserted lack of clarity. Nor do they even claim that they have requested clarification by the Secretary in the first instance, or that they have been precluded from enforcing their laws in any proceeding.

Moreover, to the extent that the operation of any waived state or local law would interfere with the expeditious construction of the border fence, that state law is already preempted, regardless of whether the Secretary's waiver is effective, because, as petitioners concede, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. Pet. 27 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioners further concede (Pet. 32) that "Congress has directed the Department of Homeland Security to construct a substantial barrier along significant portions of the United States' international border, and has indicated that it regards the expeditious construction of the border fence to be of the highest priority." It follows that, to the extent any state or local law interferes with the expeditious construction of the border fence, it is necessarily preempted. Thus, to the extent that petitioners allege that the waivers harm them by expediting the construction of border barriers, any state law whose waiver they contest is preempted, thus preventing them from obtaining any real-world relief even if they could overturn the Secretary's waiver of state and local laws.[5]

c. In any event, federal courts have "substantial discretion" in deciding whether to grant declaratory relief.

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[5] Petitioners note (Pet. 29-30) that the waivers at issue will stand unless this Court grants certiorari, because no other parties have sought judicial review within the limitations period. But, as this Court has previously explained, "[t]he assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); accord *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982); *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

Wilton v. *Seven Falls Co.*, 515 U.S. 277, 286 (1995). Thus, even if petitioners' interests were technically sufficient to create a controversy in the Article III sense, the inescapably abstract nature of their claims, which would not halt construction of the border barriers and roads, provides a sufficient reason to deny declaratory relief—and, a fortiori, certiorari.

2. There is, moreover, no split of authority with respect to the Secretary's exercise of waivers authorized by Section 102(c)(1) of IIRIRA. Four courts (including the district court in this case) have addressed challenges to the waiver provision, and all four have upheld its constitutionality. See Pet. App. 49a-55a; *Save Our Heritage Org.* v. *Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife* v. *Chertoff*, *supra*; *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).[6] That unanimity is not surprising in light of this Court's prior decisions, which, as discussed below, establish that the waiver is not an unconstitutional delegation of legislative power. Moreover, this Court denied certiorari in *Defenders of Wildlife*, which raised the same constitutional issue petitioners seek to litigate in their first question presented.

Petitioners contend (Pet. 15-16) that the decision below conflicts with other judicial decisions "appreciat[ing] that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a court." But this Court vacated the only court of appeals decisions petitioners cite for that proposition. See Pet. 16-17 (citing *South Dakota* v. *United States*

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[6] There are of course no court of appeals decisions on point because district court decisions concerning the constitutionality of a Section 102(c) waiver are reviewable only by this Court. IIRIRA § 102(c)(2)(C), as amended, 119 Stat. 306.

Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996); *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991)).[7] Petitioners also cite (Pet. 16) *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971), a three-judge-district-court decision upholding the constitutionality of the Economic Stabilization Act of 1970 against a claim that it was an unconstitutional delegation of legislative authority to the Executive. Although the district court's opinion in that case does contain dicta indicating that the intelligible-principle requirement facilitates judicial review when such review is available, *id.* at 759-760, it contains no statement at all regarding the constitutionality of delegations of authority whose exercise is not judicially reviewable, including authority—like the statutory waiver at issue here—"where the legislature manifests an intent to avoid review in order to further its objective." *Id.* at 760. Nothing in *Amalgamated Meat Cutters* is contrary to the decision below.

Moreover, petitioners concede that, in addition to the fact that every court to have addressed the statutory waiver provision of Section 102(c) of IIRIRA has upheld

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[7] Petitioners suggest (Pet. 17) that this Court's orders vacating the courts of appeals' decisions in *South Dakota* and *Widdowson* do nothing to undermine the force of those lower court decisions. But this Court has made clear that a vacated decision lacks precedential force. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 117 (1943). And both of the courts whose decisions were vacated also apply that view. See, *e.g.*, *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 973 & n.4 (10th Cir. 2005) (specifically noting that because it was vacated by this Court, the *South Dakota* decision "has no precedential value"), cert. denied, 549 U.S. 809 (2006); *Salitros* v. *Chrysler Corp.*, 306 F.3d 562, 575 n.2 (8th Cir. 2002) ("A vacated decision is deprived of its precedential effect," even when vacated "on a different ground.").

its constitutionality, the only non-vacated court of appeals decision on the more general question of whether judicial review is necessary for a delegation to be constitutional held that such review is *not* necessary. Pet. 15 (citing *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), cert. denied, 507 U.S. 917 (1993)).

3. The district court's decision with respect to the nondelegation doctrine follows the firmly established precedent of this Court. Petitioners correctly note "[t]he settled understanding that * * * a delegation of discretionary power to the Executive Branch is permissible so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" Pet. 12-13 (brackets in original) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), and *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)); accord, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Loving* v. *United States*, 517 U.S. 748, 771 (1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991). To provide a constitutionally sufficient "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). That is not a difficult test to meet, and, as this Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle"—and it has not found any in the last 70 years. *Whitman*, 531 U.S. at 474 (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); see *Loving*, 517 U.S. at 771 (same); *Mistretta*, 488 U.S. at 373

(same); *id.* at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

The waiver provision in Section 102(c) of IIRIRA readily meets the applicable test. Congress has clearly delineated the general policy, namely "to ensure expeditious construction of the barriers and roads under this section," IIRIRA § 102(c)(1), as amended, 119 Stat. 306, which are, by definition, "in the vicinity of the United States border," and are erected "to deter illegal crossings in areas of high illegal entry into the United States," § 102(a), 110 Stat. 3009-554. Congress has clearly identified the Secretary as the public official who is to apply the standard. And Congress has established the boundaries of the Secretary's authority by permitting a waiver only for construction along the border and only when "necessary to ensure expeditious construction of the barriers and roads under" Section 102. § 102(c)(1), as amended, 119 Stat. 306.

Although there can be little doubt that Section 102(c) satisfies the usual test for an intelligible principle, "the same limitations on delegation" do not even apply in a case like this, in which "'the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Loving*, 517 U.S. at 772 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975)). Here, the Executive Branch possesses independent authority over the subject matters related to border barriers, namely immigration, protection of the border, and advancement of foreign-relations interests. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is

especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (citation omitted); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) ("The right to [exclude aliens] * * * is inherent in the executive power to control the foreign affairs of the nation."). Those considerations are, of course, at their zenith with respect to security at the very borders of the Nation.

Thus, it is not surprising that petitioners do not argue that the statutory waiver provision fails, per se, to provide a sufficiently intelligible principle.

4. Petitioners instead assert (Pet. 4, 11-12) that the intelligible-principle test should include an additional element; they contend that Congress cannot confer decisionmaking authority on the Executive unless it provides both an intelligible principle *and* judicial review of the Executive's compliance with the statutory standard. That assertion is contrary to this Court's previous decisions, and, with the exception of decisions vacated by this Court (see pp. 14-15, *supra*), petitioners cite no decision by any court holding that judicial review for statutory compliance is invariably necessary for a conferral of authority on the Executive Branch to be constitutional.

A similar argument was raised in *Touby* v. *United States*, *supra*, but the majority of the Court—unlike the concurring opinion of Justice Marshall that petitioners quote (Pet. 14)—did not announce any such rule. Instead, the majority concluded that it was sufficient that the statutory scheme at issue there, which imposed criminal sanctions for a violation, allowed a criminal defendant to challenge the administrative decision while defending himself against a prosecution. See *Touby*, 500

U.S. at 168-169. Even Justice Marshall's explanation of the need for judicial review in *Touby* depended on the fact that the administrative standard in question was enforceable "by criminal law"—implicating a species of personal rights that is not relevant in this case—and cited a passage in *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), that preserved judicial review in a non-criminal context only for constitutional claims. See *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

a. Petitioner's theory is not supported by the constitutional underpinnings of the nondelegation doctrine. The doctrine derives from the vesting of enumerated "legislative Powers" in Congress. See U.S. Const. Art. I, § 1. Accordingly, "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472; accord *Loving*, 517 U.S. at 771 (explaining that the doctrine derives from "the understanding that Congress may not delegate the power to make laws"). The Judiciary's role (if any) is separate from the answer to that question. Whether or not a given power is "legislative" or constitutes "the power to make laws" under our Constitution has nothing to do with whether the exercise of that power is subject to judicial (or any other) review.

b. Petitioners' legal argument also cannot be reconciled with this Court's application of the intelligible-principle test as a one-step inquiry. In cases specifically addressing nondelegation arguments, it has been clear that the only constitutional requirement is that Congress *provide* an intelligible principle for the Executive. Indeed, petitioners acknowledge "[t]he settled understanding that * * * a delegation of discretionary power to the Executive Branch is permissible so long as Congress 'lay[s] down by legislative act an intelligible

principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" Pet. 12-13 (brackets in original) (quoting *Mistretta*, 488 U.S. at 372). According to the plain terms of that test, the only constitutional requirements are that Congress "lay down" the "intelligible principle" and "direct[]" the agency to conform to it, *not* that Congress also provide for judicial review as a mechanism by which compliance will be enforced. Numerous other decisions have repeated that clear formulation of the test, which stresses the establishment of a standard for the Executive to apply, without mentioning judicial application. See, *e.g.*, *Touby*, 500 U.S. at 165 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409); *Mistretta*, 488 U.S. at 372 (same); *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (same); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); see also *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952) ("This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."); *Whitman*, 531 U.S. at 489-490 (Stevens, J., concurring in part and concurring in the judgment) ("As long as the delegation *provides* a sufficiently intelligible principle, there is nothing inherently unconstitutional about it.") (emphasis added).

Nonetheless, petitioners assert (Pet. 13), that the purpose of requiring Congress to establish an intelligible principle is to facilitate judicial review, from which they further infer that judicial review must be constitutionally required. For that proposition, they rely on dictum in *Yakus* v. *United States*, 321 U.S. 414, 426 (1944), and cases that have quoted or paraphrased

Yakus. See Pet. 12-14.[8] But *Yakus* actually implies just the opposite:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power.

321 U.S. at 426 (emphasis added; internal citation omitted); accord *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126, 144 (1941). As this quotation makes clear, this Court has understood the purpose of the intelligible-principle test as facilitating accountability generally, rather than focusing on providing a framework for courts when they have a role in reviewing the agency's action. Thus, the intelligible-principle requirement also serves to ensure the availability of a basis for Congress and the public to evaluate the Executive's actions and to facilitate political remedies when an agency violates statutory standards. See *Bozarov*, 974 F.2d at 1041 (concluding that the better argument is that "the purpose of an intelligible principle is simply to channel the

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[8] Petitioners also quote (Pet. 13-14) *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989), as evidence of a supposed commitment to the importance of judicial review, but the statements about judicial review in *Skinner* reflect the fact that judicial review was, in fact, available in that case. At any rate, those statements trace back through *Mistretta* to *Yakus* as their ultimate source. As explained in the text, *Yakus* is contrary to petitioners' suggestion that the purpose of the intelligible-principle test is to facilitate judicial review.

discretion of the executive and to permit Congress to determine whether its will is being obeyed," rather than "to permit a court to ascertain whether the will of Congress has been obeyed"). That is, of course, consistent with the numerous instances in which there is no judicial review of Executive action implementing statutory authorizations.

Indeed, while judicial review is now generally provided by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the APA did not exist until long after the nondelegation doctrine had been recognized, and it still does not apply, for example, to decisions of the President, see *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992), or to any decision that is committed to agency discretion or with regard to which judicial review would be inconsistent with the statutory scheme. See 5 U.S.C. 701(a)(1) and (2); see also, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 130-133 (1987) (holding that "prosecutorial" decisions of the General Counsel of the NLRB are not subject to judicial review, in part because review "would involve lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary"). Many decisions are thus, by their nature, not subject to judicial review, although political checks exist if the Executive exceeds the limits of a valid statute. If Congress believes that the Secretary's waiver in this case was overbroad or that it was not actually necessary to the expeditious construction of a border barrier in an area of high illegal entry, it can repeal or modify the waiver authority in IIRIRA, specify that certain laws are applicable to the relevant portion of the border fence, require alternative procedures in lieu of other

statutes, or employ a variety of political tools to exert pressure on the Executive.

c. Petitioners' contrary view—that the purpose of the intelligible principle requirement is *solely* to facilitate judicial review and that therefore judicial review is constitutionally required—is not only contrary to this Court's statement in *Yakus*, it is also belied by the fact that this Court has never suggested that the absence of judicial review creates a constitutional difficulty in its many decisions approving grants of authority by Congress to the Executive without judicial review for statutory compliance. Indeed, under petitioners' submission, in each of those cases, this Court approved an unconstitutional delegation. For example, in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Court held that judicial review was not available for a decision by the Civil Aeronautics Board, with the approval of the President, to grant one entity (and deny another) the right to fly specified routes between the United States and foreign countries. *Id.* at 114. The authority to grant that right had been conferred by Congress through legislation, and this Court noted that it was irrelevant whether the authority was viewed as legislative or executive in origin because "Congress may of course delegate very large grants of its power over foreign commerce to the President." *Id.* at 109 (citing *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294 (1933)). In short, this Court concluded that the statutory authorization was valid despite the absence of judicial review. That holding forecloses petitioners' contrary argument.

Similarly, in *United States ex rel. Knauff* v. *Shaughnessy*, *supra*, this Court upheld the statutory grant of authority to the President, delegated to the Attorney

General, to impose restrictions and prohibitions on persons' entry into and departure from the United States when he determined that the public interest of the United States so required. 338 U.S. at 543-544. The Court concluded that Congress's broad authorization was constitutionally acceptable, despite the fact that the Executive's exclusion decisions applying that standard were not subject to judicial review. *Id.* at 543.

There are many other examples of this Court's approval of statutes that confer broad authority on the Executive in the absence of judicial review. For example, in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), Congress created a detailed scheme for the decennial census, at the culmination of which the President was to report to Congress on the population of each State and the number of Representatives in the House of Representatives to which it would then be entitled. The Court made clear that the President's duty in this regard was not "ministerial," *id.* at 800, and that he was to exercise statutory authority to make "policy judgments" regarding the census, *id.* at 799. Nevertheless, it held that the President's exercise of that authority was subject to judicial review only for constitutional violations and not for any failure to comply with statutes, *id.* at 801—which mirrors the result prescribed by the statutory limits on judicial review in this case.

The same is true of *Dalton* v. *Specter*, 511 U.S. 462 (1994), in which this Court addressed a statute granting the President the uncircumscribed authority to approve or disapprove a list of military bases to be closed. See *id.* at 470. The Court concluded that statutory judicial review of the President's decision was not available. *Id.* at 476.

In *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), the Court considered a statute that appropriated funds to the Indian Health Service to spend "for the benefit, care, and assistance of the Indians," 25 U.S.C. 13. The Court concluded that the Indian Health Service's decision regarding what programs to fund was not judicially reviewable under the APA. *Lincoln*, 508 U.S. at 193-194. The opinion contains no hint that the absence of judicial review meant that the statute effected an unconstitutional delegation.

d. Petitioners acknowledge (Pet. 20) that judicial review is not constitutionally necessary for all delegations of authority by Congress to the Executive. They suggest that judicial review is required unless the relevant delegation falls within what they describe as "narrow but well-recognized exceptions to the general presumption of reviewability" for statutory authorizations otherwise "squarely within the independent authority of the Executive." Petitioners claim that category of exceptions includes such diverse subjects as "[d]elegations directly to the President, the exercise of prosecutorial discretion, allocations of lump-sum appropriations, and agency determinations that affect only public, as opposed to private rights." *Ibid.* The conceded existence of those multifarious, unrelated exceptions in no way means that the Constitution compels judicial review of the implementation of all other statutory authorizations.

5. In the second question presented, petitioners contend that the Secretary lacks authority under Section 102(c)(1)'s statutory waiver provision to waive the applicability of *state* or *local* laws in conjunction with the construction of border barriers. The statute itself plainly confers the necessary authority upon the Secretary.

Petitioners agree (Pet. 24) that Congress can "delegate[] authority to an agency to preempt" state and local laws. Their suggestion that the language of Section 102(c)(1) of IIRIRA does not confer that authority is without merit. Congress provided that "[n]otwithstanding *any other provision of law*, the Secretary of Homeland Security shall have the authority to waive *all legal requirements* such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1), as amended, 119 Stat. 306 (emphases added). The authority to "waive all legal requirements" encompasses the authority to preempt state and local laws.

Petitioners contend (Pet. 24) that Congress did not intend to confer authority to preempt state laws because it used the word "waive" instead of "preempt" or "supersede." But the word "waive" is not ambiguous; Congress unquestionably intended to confer upon the Secretary the authority to determine that state laws were inoperative because they would interfere with Congress's command to construct border barriers expeditiously. Petitioners provide no alternative explanation for what Congress meant.[9] Petitioners also suggest (Pet. 25) that

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[9] Congress's reason for using the word "waive" here—rather than "preempt"—can be explained by both the history of the statute and the meanings of those two words. As noted above, IIRIRA Section 102(c) originally provided that the provisions of the ESA and NEPA "are *waived* to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555 (emphasis added). In that context, "waived" was appropriate because the concept of "preemption" does not normally apply to *federal* statutes. See, *e.g.*, *Black's Law Dictionary* 1216 (8th ed. 2004) (defining preemption as "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or sup-

when Congress authorized the waiver of "all legal requirements," it was insufficiently clear that it meant to include state law. But that suggestion defies natural English usage. On its face, "all legal requirements" includes requirements imposed by state law. Indeed, elsewhere in the petition (Pet. 4), petitioners acknowledge that "the Act imposes no restrictions on the type of 'legal requirement' [the Secretary] may waive." And the legislative history of the REAL ID Act demonstrates that Members of Congress understood that the reference to "all legal requirements" was broad enough to reach state and local laws.[10] Contrary to petitioners' claims (Pet. 26), the statute here presents a "clear and unequivocal delegation of authority from Congress authorizing [an agency] to preempt," and the Secretary's waiver of state laws was therefore authorized.

Of course, even if there were no statutory waiver provision, the Secretary could still preempt state law to

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plant any inconsistent state law or regulation"). When Congress later amended section 102(c) of IIRIRA to allow the waiver of "all legal requirements," that word choice followed from the use of "waive[r]" in the previous version of the statute and from the reference to "all legal requirements," which, by including federal laws, would again have made a reference to preemption peculiar.

[10] See, *e.g.*, 151 Cong. Rec. H561 (daily ed. Feb. 10, 2005) (statement of Rep. Dingell) ("Look at Section 102 of the bill. That section allows the Secretary of Homeland Security to waive ANY and ALL federal, state, or local law that the Secretary determines should be waived to ensure the construction of physical barriers and roads to deter illegal border crossings."); *id.* at H554 (statement of Rep. Harman) (criticizing "the radical steps of eliminating all State and local powers, let alone Federal, and rolling back all judicial review"); *id.* at H556 (statement of Rep. Oberstar) (speculating that the Secretary could use the waiver authority to "exempt [construction] contractors from Federal and State withholding").

accomplish the purposes of Section 102 of IIRIRA. State law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[11] And "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). Petitioners admit (Pet. 32) that Congress "has indicated that it regards the expeditious construction of the border fence to be of the highest priority," and they do not contend that any state law whose waiver is at issue here is consistent with that goal and nonetheless rendered inoperative by the Secretary's waiver. Accordingly, the state laws waived not only could be preempted by federal regulation but were in fact preempted by operation of Section 102(c)(1), independent of any express waiver executed by the Secretary.

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[11] Petitioners quote (Pet. 27) *Hines* but state that agency action can only preempt state law "when a *court* finds" the necessary conflict. Neither *Hines* nor any other case of which we are aware requires a court finding before an agency action can have preemptive effect. To the contrary, this Court has made clear that "state law is nullified to the extent that it * * * 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines*, 312 U.S. at 67).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys

MARCH 2009

APPENDIX

Section 102(a)-(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554 to 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306, and the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, provides as follows:

(a) IN GENERAL.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS IN THE BORDER AREA.—

(1) SECURITY FEATURES.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall provide for least [*sic*] 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors—

(i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;

(ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;

(iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas;

(iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and

(v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

(B) PRIORITY AREAS.—With respect to the border described—

(i) in subparagraph (A)(ii), the Secretary shall ensure that an interlocking surveillance camera system is installed along such area by May 30, 2007, and that fence construction is completed by May 30, 2008; and

(ii) in subparagraph (A)(v), the Secretary shall ensure that fence construction from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry is completed by December 31, 2008.

(C) EXCEPTION.—If the topography of a specific area has an elevation grade that exceeds 10 percent, the Secretary may use other means to secure such area, including the use of surveillance and barrier tools.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and

shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection not to exceed $12,000,000. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) WAIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) FEDERAL COURT REVIEW.—

(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have juris-

diction to hear any claim not specified in this subparagraph.

(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.